

1 geospatial information to describe, assess and visually depict physical features and
2 geographically referenced activities on the Earth. Geospatial-intelligence consists
3 of imagery, imagery intelligence and geospatial (e.g. mapping, charting and
4 geodesy) information.

5 3. As the Director of the Acquisition Directorate in NGA, and as an original
6 classification authority for the Agency, I am responsible for protecting information
7 that originates with NGA or otherwise implicates NGA interests. As part of my
8 official duties, I ensure that any determinations as to the release or withholding of
9 such information are proper and do not endanger NGA personnel or facilities, and
10 do not jeopardize the interests of NGA or of U.S. national security.

11 4. As part of my official duties I am authorized to assess the current, proper
12 classification of NGA information, based on the classification criteria of Executive
13 Order 12958¹, as amended, ("E.O. 12,958"), and applicable NGA regulations.
14 Furthermore, as a senior NGA official and under a written delegation of authority
15 pursuant to section 1.3(c) of E.O. 12,958, I hold original classification authority at
16 the SECRET level. I am therefore authorized to conduct classification reviews and

¹ E.O. 12,958 was amended by E.O. 13,292. See Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to E.O. 12,958 are to E.O. 12,958 as amended by E.O. 13,292. On December 29, 2009, President Barack Obama issued E.O. 13,526, the relevant provisions of which superseded E.O. 12,958, as amended, and E.O. 13,292 when they went into effect in June 2010. See 75 Fed. Reg. 707 (Jan. 5, 2010).

1 to make original classification and declassification decisions and to make
2 determinations as to release or withholding of NGA information, including
3 information that may be the subject of Freedom of Information Act ("FOIA"), 5
4 U.S.C. § 552, requests. Information that reasonably could be expected to cause
5 damage to national security, if improperly disclosed, shall be classified as
6 CONFIDENTIAL; serious damage as SECRET; and exceptionally grave damage
7 as TOP SECRET.

8 5. Through the exercise of my official duties I am familiar with this civil
9 action. I submit this declaration in support of NGA's motion for summary
10 judgment in this proceeding.

11 6. The Center for Human Rights and Constitutional Law's (plaintiff) FOIA
12 request sought satellite imagery of the Cuban coastal waters, taken on or about
13 February 24, 1996, and documents related to those images. As an original
14 classification authority for NGA, I have determined that NGA can neither confirm
15 nor deny the existence or nonexistence of the records responsive to plaintiff's
16 FOIA request because the fact of the existence or nonexistence of any records
17 responsive to the request is currently and properly classified information
18 concerning intelligence sources and methods, exempt from release under FOIA

1 exemptions (b)(1) and (b)(3). I explain this determination, commonly referred to
2 as a Glomar response² below.

3 7. As further discussed below the fact of the existence or nonexistence of the
4 requested records is currently and properly classified in accordance with E.O.
5 12,958 and is protected from disclosure by statute. Official NGA
6 acknowledgement of the requested records would reveal information that concerns
7 intelligence activities, intelligence sources and methods, and foreign relations. The
8 disclosure of such information reasonably could be expected to cause damage to
9 the national security of the United States.

10 8. The purpose of this declaration is to articulate the basis for NGA's Glomar
11 response to plaintiff's request for information under the FOIA and to identify the
12 applicable FOIA exemptions that support the Glomar response in this case.

13 Plaintiff's FOIA Request

14 9. Plaintiff sent NGA a FOIA request dated December 29, 2009, requesting:

15 [A.] Any satellite images, satellite imagery, satellite photographs, or
16 satellite video images of the area in which an incident took place on
17 February 24, 1996 over or near the north coast of Cuba in which two
18 aircraft flown by the Brothers to the Rescue organization of Florida
19 were intercepted in flight and shot down by Cuban MiGs, including
20 but not limited to satellite images, satellite imagery, satellite

² The origins of the Glomar response trace back to Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), which affirmed CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning CIA's reported contacts with the media regarding Howard Hughes' ship, the "Hughes Glomar Explorer."

1 photographs, or satellite video images showing any of the Brothers to
2 the Rescue or Cuban aircraft involved in the incident...whether
3 created any time before, during, or after the downing of the two
4 aircraft, including any images or photos of any wreckage.
5

6 [B.]Any documents or records relating to the items sought in number
7 1 above including but not limited to reports, requests, assessments,
8 data compilations, directives, instructions, guidance, memoranda,
9 correspondence, notes, indices, cables, telexes, telegrams, or letters,
10 whether maintained in paper, digital, video, digital tape, audio tape, or
11 any other preserved form, regarding the aforementioned satellite
12 images, satellite imagery, satellite photographs, or satellite video
13 images.
14

15 See Plaintiffs' Complaint at 3.
16

17 10. By letter dated April 6, 2010, NGA denied the plaintiff's FOIA request
18 stating that it could "neither confirm nor deny the existence or nonexistence of
19 records responsive to your request." The letter further stated that records, if they
20 exist, are "classified for reasons of national security under Executive Orders
21 12,951 and 12,958" and that acknowledging the existence or nonexistence of such
22 records "would also relate directly to information concerning intelligence sources,
23 methods, or capabilities, and as a result, is exempt from search, review, publication
24 or disclosure in accordance with Title 10, Section 457, United States Code."
25

26 11. Plaintiff appealed NGA's denial by letter dated April 9, 2010. In light of
27 plaintiff's filing of the current litigation on May 5, 2010, NGA has ceased
28 processing the administrative appeal the plaintiff filed with NGA.

Basis for NGA's Glomar Determination

12. NGA's response to plaintiff's FOIA request —neither confirming nor denying the existence or non-existence of records—is commonly referred to as a Glomar response. This response protects a specific and narrow type of classified fact, and is provided for under E.O. 12,958, section 3.6(a):

[I]n response to a request for information under the Freedom of Information Act . . . An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

Plaintiff's request presents an instance where mere confirmation or denial of the existence of responsive records would reveal classified facts—NGA's interest, ability, or involvement in obtaining satellite data, and the breadth and scope of that interest. Such a response would reveal intelligence activities, intelligence sources and methods, and concern U.S. foreign relations. Thus, NGA's only course of action here is to invoke a Glomar response by stating that it can neither confirm nor deny the existence or nonexistence of the requested records.

13. By contrast, in a typical FOIA request scenario, a FOIA requester submits a request to NGA for information on a particular subject and NGA responds by conducting a search of non-exempt records and advising whether responsive records were located. If records are located, NGA provides non-exempt records or reasonably segregable non-exempt portions of records, and withholds the

1 remaining exempt records and exempt portions of records. In this typical
2 circumstance, NGA's response, either to provide or not provide the records sought,
3 actually confirms the existence or nonexistence of NGA records. Generally, such
4 confirmation poses no harm to national security or intelligence sources and
5 methods because the response focuses on releasing or withholding specific
6 substantive information. In those circumstances, the fact that NGA possesses or
7 does not possess records is not itself a classified fact.

8 14. However, in this case, NGA's interest, ability, or involvement in obtaining
9 satellite data, and the breadth and scope of that interest is currently a properly
10 classified fact, the disclosure of which reasonably could be expected to cause
11 damage to national security. In other words, what is classified is not just
12 individual records themselves on a document-by-document basis, but also the mere
13 fact of NGA's intelligence gathering and capability, and the possibility that NGA
14 possesses responsive records derived there from. NGA confirmation of the
15 existence or nonexistence of records responsive to any of the categories in
16 plaintiff's request would acknowledge an intelligence interest, or lack thereof, in
17 the time, location, incident, foreign nation, etc., concerning the subject of
18 plaintiff's request and would reveal intelligence activities, intelligence sources and
19 methods, and concern U.S. foreign relations.

1 15. In order to be credible and effective, NGA must use the Glomar response
2 consistently in all cases where the existence or nonexistence of records responsive
3 to a FOIA request is a classified fact, including those instances in which NGA does
4 not possess records responsive to a particular request. If NGA were to invoke a
5 Glomar response only when it possessed responsive records, and inform requesters
6 when it had no records, the Glomar response would unsurprisingly be interpreted
7 as an admission that responsive records exist. This practice would reveal the very
8 information that NGA must protect in the interest of national security, provide a
9 valuable advantage to terrorist organizations and foreign intelligence services, and
10 endanger NGA's intelligence activities worldwide.

11 16. If NGA were to admit that it had "any satellite images, satellite imagery,
12 satellite photographs or satellite video images" related to a specific incident, date,
13 and location, NGA would alert foreign intelligence services to NGA's intelligence
14 capabilities and interests. Disclosure of whether NGA was involved or not in
15 collecting satellite data or any other intelligence activities related to this request
16 would expose whether or not NGA maintains an intelligence interest in specific
17 activities or locations. Additionally, disclosure of whether or not NGA has the
18 requested information would reveal information concerning the reach, locations,
19 and capabilities or limitations of NGA's intelligence activities and operations.
20 With knowledge of NGA's intelligence interests and capabilities, foreign

1 intelligence services could initiate denial and deception techniques which could
2 affect NGA access to vital sources of information. For instance, knowing where
3 and when NGA seeks to collect data, foreign adversaries could seek to provide
4 false sources of data or to prevent collection of data altogether.

5 17. If NGA were to deny that it had such images related to a specific incident,
6 date, and location, NGA would likewise alert foreign intelligence services to
7 NGA's intelligence capabilities and interests, or lack thereof. Knowledge of
8 NGA's capabilities and areas of interest would be the foundation of any foreign
9 attempt to develop "denial and deception" techniques to defeat those capabilities.

10 18. The potential harm to NGA is possibly magnified if a foreign intelligence
11 service were to submit multiple intelligence requests. If a foreign intelligence
12 service could gather information on NGA's intelligence capabilities and interests
13 using multiple FOIA requests, the foreign intelligence service could cobble
14 together those responses to create a picture of NGA's overall capabilities and
15 intelligence interests. Every country or intelligence service has limited resources.
16 The disclosure of potential U.S. intelligence target areas and interests would
17 indicate how NGA allocates its resources. Any one FOIA request standing alone
18 might not allow great insight into where NGA is (and is not) monitoring foreign
19 adversaries. However, multiple requests would potentially allow adversaries to

1 hide their activities by exploiting data about how NGA allocates its collection
2 resources.

3 19. In sum, for NGA to officially confirm or deny the existence or nonexistence
4 of the requested records would reveal classified national security information that
5 concerns intelligence activities, intelligence sources and methods, and U.S. foreign
6 relations. I have determined that such a revelation could be expected to cause
7 damage to U.S. national security. Accordingly, I have determined that the fact of
8 the existence or nonexistence of records responsive to plaintiff's FOIA request is
9 currently and properly classified and exempt from release under FOIA exemptions
10 (b)(1) and (b)(3).

11 Applicable FOIA Exemptions

12 A. FOIA Exemption (b)(1)

13 20. FOIA exemption (b)(1), 5 U.S.C. § 552(b)(1), provides that the FOIA
14 disclosure provisions do not apply to matters that are:

15 (A) specifically authorized under criteria established by an Executive
16 order to be kept secret in the interest of national defense or foreign
17 policy and (B) are in fact properly classified pursuant to such
18 Executive order.

19
20 21. Section 1.1(a) of E.O. 12,958 provides that information may be originally
21 classified under the terms of this order only if all of the following conditions are
22 met:

1 (1) an original classification authority is classifying the information;
2 (2) the information is owned by, produced by or for, or is under the
3 control of the U.S. Government; (3) the information falls within one
4 or more of the categories of information listed in section 1.4 of E.O.
5 12,958; and (4) the original classification authority determines that the
6 unauthorized disclosure of the information reasonably could be
7 expected to result in some level of damage to the national security and
8 the original classification authority is able to identify or describe the
9 damage.

10
11 22. Furthermore, section 3.6(a) of E.O. 12,958 specifically states that “[a]n
12 agency may refuse to confirm or deny the existence or nonexistence of requested
13 records whenever the fact of their existence or nonexistence is itself classified
14 under this order or its predecessors.” E.O. 12,958 therefore explicitly sanctions
15 precisely the type of response that NGA has provided to plaintiff in this case.

16 23. Consistent with Sections 1.1(a) and 3.6(a) of E.O. 12,958, and as described
17 below, I have, as an original classification authority, determined that: the existence
18 or nonexistence of the requested records is a fact that constitutes information
19 owned by and under the control of the U.S. Government; this information is a
20 properly classified fact that concerns E.O. 12,958 section 1.4(c) intelligence
21 activities and intelligence sources and methods, and E.O. 12,958 section 1.4(d)
22 foreign relations of the U.S.; and the unauthorized disclosure of this fact
23 reasonably could be expected to result in some level of damage to the national
24 security. In the subsequent paragraphs, I identify and describe the potential
25 damage.

1 1. Intelligence Activities

2 24. Responding to plaintiff's FOIA request with anything other than a Glomar
3 response reasonably could be expected to cause some level of damage to U.S.
4 intelligence activities. An acknowledgement of information regarding specific
5 intelligence activities reveals NGA's specific intelligence interests and capabilities.
6 Terrorist organizations, foreign intelligence services and others who have interests
7 opposed to those of the United States use this information to thwart NGA
8 activities. These parties continually search for information regarding the activities
9 of NGA and are able to gather information from myriad sources, analyze this
10 information, and create ways to defeat NGA activities from seemingly disparate
11 pieces of information. In this case acknowledging the existence or nonexistence of
12 the requested records reasonably could be expected to cause some level of damage
13 to national security by disclosing intelligence collection efforts.

14 2. Intelligence Sources and Methods

15 25. Responding to plaintiff's FOIA request with anything other than a Glomar
16 response reasonably could be expected to cause some level of damage to U.S.
17 intelligence sources and methods. Intelligence sources and methods include the
18 business practices and methodological basic "tools" used by NGA to accomplish
19 its mission. They can include sophisticated technological tools, liaison
20 relationships, and NGA's identification of targets for intelligence collection

1 activity, among other sensitive sources and methods. As stated above, to confirm
2 or deny whether NGA has records responsive to Plaintiff's request could risk the
3 disclosure of these intelligence sources and methods.

4 26. Intelligence sources and methods must be protected from disclosure in
5 every situation where a certain intelligence interest, capability, or technique is
6 unknown to those groups that could take countermeasures to nullify its
7 effectiveness. Secret information-collection techniques, capabilities, or
8 technological devices are valuable (from an intelligence-gathering perspective)
9 only so long as they remain unknown and unsuspected. Once an intelligence
10 source or method (or the fact of its use in a certain situation) is discovered, its
11 continued successful use by NGA is seriously jeopardized. In fact, detailed
12 knowledge of intelligence sources and methods must be protected from disclosure
13 because such knowledge would be of material assistance to those who seek to
14 detect, prevent, or damage U.S. intelligence operations.

15 27. Because foreign intelligence services view discovery of NGA capabilities as
16 one of their primary defensive missions, these admissions would be of great
17 benefit, by enabling the foreign services to redirect their resources to identify
18 potential NGA sources, circumvent the NGA's monitoring efforts, and generally
19 enhance their intelligence activities at the expense of the United States.

1 28. NGA must do more than prevent explicit references to an intelligence
2 source or method; it must also prevent indirect references to such a source or
3 method. One vehicle for gathering information about NGA capabilities is by
4 reviewing officially-released information. Terrorist organizations and foreign
5 intelligence services have the capacity and ability to gather information from
6 myriad sources, analyze it, and deduce means and methods (from disparate and
7 even seemingly unimportant details) to defeat NGA collection efforts. Even
8 seemingly innocuous, indirect references to an intelligence source or method could
9 have significant adverse effects when juxtaposed with other publicly-available
10 data.

11 29. As discussed below, intelligence sources and methods information also falls
12 within the ambit of the National Security Act of 1947, as amended, 50 U.S.C. §
13 403-1(i)(1) and thus is exempt from disclosure under FOIA exemption (b)(3). The
14 information sought by the plaintiff is specifically related to this statutory
15 protection. Accordingly, FOIA exemptions (b)(1) and (b)(3) apply independently
16 and co-extensively to plaintiffs FOIA request.

17 3. Foreign Relations

18 30. Responding to plaintiff's FOIA request with anything other than a Glomar
19 response reasonably could be expected to cause some level of damage to U.S.
20 foreign relations. In carrying out its legally authorized intelligence activities, NGA

1 engages in activities that if known by foreign nations, could reasonably be
2 expected to cause damage to U.S. relations with affected or interested nations.
3 Although it is generally known that NGA provides products and services related to
4 geospatial intelligence, identifying an interest in a particular matter or publicly
5 disclosing a particular intelligence operation could well cause the affected or
6 interested foreign government to respond in ways that would seriously damage
7 U.S. national interests. If specific operations involving foreign nations were
8 exposed or publicly acknowledged U.S. foreign relations would be adversely
9 impacted. The foreign government's response could be of a diplomatic or
10 economic nature, a ground for anti-American propaganda, or a reason for
11 retaliation against American citizens or other American interests. Such responses
12 could reasonably be expected even though the events may be several years past.
13 Perceptions of violation of sovereignty can generate retribution even years later.

14 31. An official acknowledgment that NGA possesses the requested information
15 also could be construed by a foreign government, whether friend or foe, to mean
16 that NGA has collected intelligence information on its citizens or resident aliens.
17 Additionally, such acknowledgement could suggest NGA has operated undetected
18 within that country's borders. For the same reasons described above, such a
19 perception could adversely affect U.S. foreign relations with that nation.

1 32. In conclusion, NGA can neither confirm nor deny whether records exist that
2 would be responsive to plaintiff's request. My determination that the existence or
3 nonexistence of the requested records is classified has not been made to conceal
4 violations of law, inefficiency, or administrative error; prevent embarrassment to a
5 person, organization or agency; restrain competition; or prevent or delay the
6 release of information that does not require protection in the interests of national
7 security.

8 B. FOIA Exemption (b)(3)

9 33. FOIA exemption (b)(3), 5 U.S.C. 552(b)(3), permits the U.S. Government
10 to withhold information prohibited from disclosure by federal statute that either

11 (A) requires that the matters be withheld from the public in such a
12 manner as to leave no discretion on the issue, or (B) establishes
13 particular criteria for withholding or refers to particular types of
14 matters to be withheld.

15
16 34. Section 102A (i)(1) of the National Security Act of 1947, as amended, 50
17 U.S.C. § 403-1(i)(1) (the "National Security Act"), provides that the Director of
18 National Intelligence (DNI) "shall protect intelligence sources and methods from
19 unauthorized disclosure." NSA § 102A(i)(1) specifically "refers to particular types
20 of matters to be withheld," as described in FOIA exemption (b)(3).

21 35. As discussed above, confirming the existence or nonexistence of responsive
22 records would necessarily reveal NGA's intelligence sources and methods. Any

1 confirmation would thus result in an unauthorized disclosure of intelligence
2 sources and methods, which NSA § 102A(i)(1) forbids.

3 36. Because plaintiff's FOIA request falls within the ambit of Section 102
4 (A)(i)(1) of the National Security Act of 1947, it is exempt from disclosure under
5 FOIA exemption (b)(3). In contrast to E.O. 12,958, as amended, this statute
6 further protects intelligence sources and methods and does not require NGA to
7 identify or describe the damage to national security that reasonably could be
8 expected to result should NGA confirm or deny the existence of records responsive
9 to plaintiff's request. Regardless, because the statute and the Executive Order
10 relate to the protection of sources and methods, I refer the Court to the paragraphs
11 above for a description of the damage to national security should anything but a
12 Glomar response be provided to plaintiff in this case. Accordingly, FOIA
13 exemptions (b)(1) and (b)(3) apply independently and co-extensively to plaintiff's
14 request.

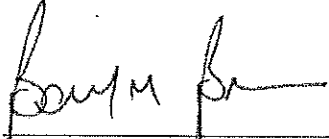
15 CONCLUSION

16 37. The existence or nonexistence of the requested records, irrespective of the
17 content of such putative records, is itself a properly classified fact, and is so
18 intricately intertwined with intelligence activities, intelligence sources and
19 methods, and U.S. foreign relations, that this fact must remain classified. As such,
20 I have determined that the only appropriate response is for NGA to neither confirm

1 nor deny the existence of the requested records under FOIA exemptions (b)(1) and
2 (b)(3).

3
4 I hereby declare under penalty of perjury that the foregoing is true and
5 correct.

6 Executed this 13th day of October 2010.

7
8 
9 _____
10 BARRY M. HARLOW
11 Director, Acquisition Directorate
12 National Geospatial-Intelligence Agency
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